Trim Corporation of America, Inc. *and* Local 2179, International Union, United Automoble, Aerospace and Agricultural Implement Workers of America-UAW, AFL–CIO. Cases 29–CA–26325, 29–CA–26378, and 29–CA–26720

May 31, 2006

ORDER REMANDING PROCEEDING

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On September 7, 2005, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent and the General Counsel filed exceptions, and the Respondent filed a supporting brief.

In its exceptions, the Respondent asserts that the judge failed to issue a reasoned decision and created the appearance of partiality by copying extensive portions of the General Counsel's posthearing brief into his decision. Because it claims this conduct demonstrates that the judge was biased against it, the Respondent asks the Board to remand the case to a different judge and to have that judge review the record and issue a proper decision. By letter dated November 22, 2005, the General Counsel filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Consistent with our decision in *Dish Network Service Corp.*, 345 NLRB No. 83 (2005), we have decided to remand this case to another judge in order for him or her to review the record and issue an appropriate decision.

In this case and in many others, the same judge has copied extensively from the General Counsel's brief in his decision. In each case, the judge then decided the case in favor of the General Counsel.[1] In this proceeding, substantial portions of the statement of facts in the judge's decision and virtually all of its legal analysis were copied almost verbatim from the General Counsel's brief.

In *Dish Network*, supra, we said: "[I]t is essential not only to avoid actual partiality and prejudgment . . . in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal." *Indianapolis Glove Co.*, 88 NLRB 986 (1950). See *Reading Anthracite Co.*, 273 NLRB 1502 (1985); *Dayton Power & Light Co.*, 267 NLRB 202 (1983).

Considering the instant case in the context of all of these cases as a whole, the impression given is that Judge Edelman simply adopted, by rote, the views of the General Counsel and failed to conduct an independent analysis of the case's underlying facts and legal issues.

The Respondent has specifically objected to Judge Edelman's extensive copying. We agree with those exceptions. It is *the Board's* solemn obligation to insure that its decisions and those of its judges are free from partiality and the appearance of partiality. The cited decisions of Judge Edelman fail to meet this elemental test.

We understand that this remand delays the issuance of a Board decision, and this may inconvenience the parties. However, we believe that the fundamental necessity to insure the Board's integrity outweighs these considerations.

In order to dispel this impression of partiality, we will remand the case to the chief administrative law judge for reassignment to a different administrative law judge. This judge shall review the record and issue a reasoned decision.[2] We will not order a hearing de novo because our review of the record satisfies us that Judge Edelman conducted the hearing itself properly.

ORDER

It is ordered that the administrative law judge's decision of September 7, 2005, is set aside.

IT IS FURTHER ORDERED that this case is remanded to the chief administrative law judge for reassignment to a different administrative law judge who shall review the record of this matter and prepare and serve on the parties a decision containing findings of fact, conclusions of

[1] See *CMC Electrical*, 347 NLRB No. 25 (2006); *Crossing Rehabilitation*, 347 NLRB No. 21 (2006); *Regency House of Wallingford*, 347 NLRB No. 15 (2006); *Simon DeBartelo Group*, 347 NLRB No. 26 (2006); *Eugene Iovine, Inc.*, 347 NLRB No. 23 (2006); *Dish Network*, supra; *Fairfield Tower Condominium Assn.*, 343 NLRB No. 101 (2004).

[2] The new judge may rely on Judge Edelman's demeanor-based credibility determinations unless they are inconsistent with the weight of the evidence. If inconsistent with the weight of the evidence, the new judge may seek to resolve such conflicts by considering "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole." *RC Aluminum Industries*, 343 NLRB No. 103, slip op. at 1 fn. 2 (2004), quoting *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (internal quotation marks and citations omitted). Alternatively, the new judge may, in his/her discretion, reconvene the hearing and recall witnesses for further testimony. In doing so, the new judge will have the authority to make his/her own demeanor-based credibility findings.

law, and recommendations based on the evidence received. Following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

Dated, Washington, D.C. May 31, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Marcia Adams, Esq., for the General Counsel.
Richard M. Howard, Esq. and *Jeffrey Meyer, Esq., (Kaufman, Schneider & Bianco., LLP),* for the Respondent.
Mathew Jackson, International Representative, Region 9 UAW, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. Upon charges filed by Local 2179, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America UAW, AFL–CIO (the Union), filed unfair labor practices set forth above against Trim Corporation of America, Inc. (Respondent). The complaint alleges a series of 8(a)(1) and (5) violations.

The trial in this matter was held in Brooklyn, New York, on May 3, 2005.

Briefs were filed by counsel for the General Counsel and counsel for Respondent. Based upon the entire record herein, including the testimony and demeanor of the witnesses called by the parties, I make the following

FINDINGS OF FACT

At all material times, Respondent, a domestic corporation with its principal office and place of business located at 882 Third Avenue, Brooklyn, New York (Brooklyn facility), has been engaged in the operation of assembling and packaging Christmas decorations and ornaments. During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its operations described above, purchased and received at its Brooklyn facility, goods and materials valued in excess of $50,000 directly from suppliers located outside the State of New York.

It is admitted, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

The following employees of Respondent set forth in paragraph 2 (the unit) constitute a unit appropriate for the purposes of collective bargaining with in the meaning of Section 9(b) of the Act:

> All warehouse and assembly employees employed by Respondent at its Brooklyn facility, excluding all managers, guards and supervisors as defined by the Act.

It is also admitted, the Union has been the designated exclusive collective-bargaining representative of the unit and has been recognized as such representative by Respondent embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from May 1, 2001, through April 30, 2004.

It is also admitted the above-described collective-bargaining agreement contains the following clause in section XXXlll:

> This contract with respect to the work or jobs now or hereafter covered shall be binding on any principal of the Employer found to be an alter ego of the Employer . . . .

Respondent assembles and packs Christmas decorations and ornaments. Since about 1993 the Union has been representing Respondent's warehouse and assembly employees.

As set forth above the last collective-bargaining agreement was in effect from May 1, 2001, and expired on April 30, 2004.[1]

Horace Anderson, a representative for the Union, has been the official responsible for servicing the members employed by Respondent since 1986. In March, Shop Steward Wilfredo Cruz informed Anderson that employees from a company called Heritage were working alongside unit employees performing the same work, specifically packing boxes of ornaments. After Cruz informed Anderson about the Heritage employees "doing everything that he did" Anderson visited Respondent's premises one day in March and observed a Heritage employee working side-by-side with unit employees. Anderson spoke to this employee who told him that he had worked for Heritage for a few weeks. Wilfredo Cruz, the union shop steward, told Anderson that about 6 to 12 other Heritage employees had been working at Respondent's facility and that Heritage employees had been doing their bargaining unit work since the end of 2003.

The expired collective-bargaining agreement has a provision set forth as follows:

> Section XXXlll:
>
> This contract with respect to the work or jobs now or hereafter covered shall be binding on any principal of the Employer found to be an alter ego of the Employer…

On April 15 Anderson and the union negotiation team met with Respondent's treasurer and comptroller, Stanley Pawigon, to begin bargaining over a successor agreement. The Union's negotiating team included Anderson, Cruz, and another employee, Robert Yulson. During that first session Anderson told Pawigon that he was aware that Heritage employees were doing bargaining unit work and that they should be covered by the

[1] All dates herein are 2004, unless otherwise stated.

Union's collective-bargaining agreement. Anderson stated to Pawigon that based upon knowledge from Cruz he thought that Heritage was an "alter-ego" of Respondent. Pawigon stated that Heritage was a separate entity, but he also told Anderson that Heritage was owned by the same individuals who owned Respondent, namely, Pawigon, Michael La Russo, and Richard Stone. Pawigon also told Anderson that Heritage's employees were represented by another union, Local 210, Warehouse and Production Employees Union, AFL–CIO, and that there was a collective-bargaining agreement covering those employees.

A. Union Requests for Information for Bargaining

Subsequently, on April 27 Anderson sent an information request to Respondent requesting the collective-bargaining agreement between Heritage and Local 210 and payroll records of Heritage employees for the last 12 months. Anderson stated that the purpose of his requests was to uncover information that might lead to a discovery that an alter ego relationship existed between Respondent and Heritage. In this letter, Anderson reminded Pawigon that during these current negotiations, Respondent had stated that Heritage had a collective-bargaining agreement with Local 210 and that the Union was requesting the information in order for it "to bargain in an intelligent manner."

On April 27 the Union set forth the following request:

> Dear Mr. Pawigon:
>
> In bargaining sessions held so far, you and your representative have claimed that Heritage, a company in your corporation has an existing collective bargaining agreement with Local 210, no International Union given. In order for us to bargain in an intelligent manner we need the following information:
>
> 1. A copy of the collective bargaining agreement between Heritage and Local 210.
> 2. A copy of the payroll records for the employees of Heritage for the last twelve (12) months.
>
> The Union is prepared to discuss appropriate confidentiality arrangements in the event it is your position that any of the requested information is confidential. If any of the information is unclear, please advise us at once so that they can be clarified.
>
> We shall appreciate receiving all of the material requested, as soon as possible. We ask that you advise us within seven (7) days of the receipt of this letter as to when you will be able to supply all or part or part of the information requested and that you supply those portions of the information requested as it becomes available.

On April 28 Respondent's attorney, Arthur Kaufman, sent a written response to Anderson's letter stating:

> As you know, this firm represents Trim Corporation of America (the "Employer") in the ongoing negotiations with Local 2179. Your letter to Stanley Pawigon of April 27, 2004 has been forwarded to my office for review. In your letter, you ask for a copy of the collective bargaining agreement between Heritage and Local 210 as well as a copy of the payroll records for the employees of Heritage for the last twelve (12) months.
>
> Please set forth with particularity the relevance and necessity of this information, given that neither Heritage nor Local 210 is a party to the ongoing negotiations between the employer and Local 2179. After you provide a basis for requesting this information, the Employer will determine whether or not it is legally obligated to produce same.

On May 3, the Union set forth a detailed response setting forth their belief of an alter ego relationship between Respondent and Heritage as follows:

> 1. The office address and employment history (including job titles and responsibilities), for the last five years of (a) each present company officer and/or director and (b) each company officer and/or director who was employed at any time during that period for each company.
> 2. The name and employment history (including job titles and responsibilities) of each current or former director, officer, supervisor, and/or employee of either of the companies who at any time within the last five years has been or was employed by either of the companies in any capacity.
> 3. The State or States in which each company has been and/or is qualified or registered to do business.
> 4. The name and address of all persons, corporations, or other entities owning stock and the percentage of their stock ownership in each company as of January 1st for each year from five years ago to date.
> 5. The nature of the business of each company, including the products, services, customers and locations of distribution warehousing, and/or sales facilities and manufacturing facilities and/or office facilities.
> 6. The date, terms and parties to each contract, commitment or understanding whether, oral or written which the companies have been jointly obligated to engage in business activity.
> 7. The date, terms and parties to each contract, commitment or understanding, whether oral or written, under which either company may have been and/or is required or authorized to use the services, facilities, personnel or equipment of the other company.
> 8. The date, terms and parties to and persons entering into each contract, commitment or understanding, whether oral or written, between the other company or any other company.
> 9. The date, terms and parties to and persons entering into each contract, commitment or understanding, whether oral or written, under which one of the companies agreed to loan, sell and/or contribute equipment, services, money and/or any other things of value to the other company or any other company.
> 10. The date and substance of each bid submitted by one company for work to be performed in whole or in part to the other company or any other company.
> 11. The date and substance of each contract entered into by one company for work which was or is being performed in whole or in part by any other company.

12. The identity of each person or entity that guaranteed the performance of each contract entered into by either company and the parties to the contract.

13. The name, effective dates, terms and class of eligible employees, supervisors, officer and/or directors of each health, life insurance, pension, incentive, stock option, retirement and/or benefits plan offered by each company.

14. The nature and terms of any lines of credit, revolving credit or other credit arrangements offered by either company to any other companies, the dates on which such credit was extended, the amount of credit extended and the parties to each extension of credit.

15. The nature and amount of indebtedness owed by each company to the other company or to anyone else on January 1st of each year from five years to date.

16. Identify the banking institution, branch location and account number of each company's bank account and payroll amounts.

17. Identify the law firm(s) and the accounting firm(s), the advertising firm(s) for each company for the last five years.

18. The name, title, employer and job duties of any persons who are or who have been responsible in any way for labor relations and/or personnel relations for each company, the period of time during which each of these persons was assigned these responsibilities and each persons' employer during each such period of time.

19. The name and title of each person responsible for new business for each company and the period or periods of time during which each of these persons was assigned these responsibilities.

20. The dates, participants and substance of each meeting, conference and/or discussions, (including telephone discussions) attended by one or more shareholder, directors, officers, supervisors and or employees or agents of either of the companies at which any business of either company was discussed.

21. Copies of all those documents including but not limited to correspondence, memoranda, notes and minutes which refer directly or indirectly to the formation, dissolution and/or function of any of the companies.

Please provide us with copies of each state license for each company.

In the event it is your position that any of the requested information is confidential, we are prepared to discuss appropriate confidentiality arrangements.

If you have any questions, please feel free to contact me at (212) 529–2580.

On May 5 Respondent replied:

> Receipt is acknowledged of your May 3, 2004 letter. You state in that letter that the Union has received reliable information that Trim Corporation ("Trim Co.") and the Heritage Company possess on alter ego relationship but fail to set forth your information.
>
> Before Trim Co. ascertains whether or not you are legally entitled to the information you request, please set forth on what basis you believe the two (2) companies possess an alter ego relationship.

On May 13, by letter, the Union responded:

> The information regarding an alter ego relationship between Trim Corporation and Heritage Company (the "Employer") is based on reports from our bargaining unit members. As the bargaining unit representative one of our roles is to police the collective bargaining agreement. The collective bargaining agreement refers to its extension to other Employer facilities. The information requested in my letter of May 3, 2004 will assist the Union in analyzing this relationship.

Respondent replied to the Union's May 13 letter as follows:

> Receipt is acknowledged of your letter dated May 15, 2004. In that letter, you claim that your bargaining unit members are reporting that Trim Corporation ("Trim Co.") and Heritage possess an alter ego relationship.
>
> However, federal labor law requires you to produce more specific information as to any alleged alter ego relationship before Trim Co. is required to produce the information you requested. Accordingly, unless and until such information is forthcoming Trim Co. will not be producing the information requested in your May 3, 2004 letter.
>
> Do not hesitate to call with any questions.

Jackson replied as follows:

> The information regarding an alter ego relationship between Trim Corporation and Heritage Company (the "Employer") is based on reports from our bargaining unit members. As the bargaining unit representatives one of our roles is to police the collective bargaining agreement. The collective bargaining agreement refers to its extension to other Employer facilities. The information requested in my letter of May 3, 2004 will assist the Union in analyzing this relationship.
>
> If you have any further questions, please feel free to contact me.

B. The June 23 Supervisor Meeting with the Unit Employees

On June 23 Cruz and his coworkers, Robert Yulson and Matthew Amos, were in the locker room at work. Admitted supervisor within the meaning of the Act, Richard Di Fransisco, came into the locker room and said he wanted to talk to them. He told them that the Union was not as "strong as it used to be," and that if they wanted to continue to work for the Respondent they had to fight for themselves. Cruz questioned him about the employees presently on lay off. Di Fransisco stated that he had no plans to call back either Bishop or Alicia.[2] Then Di Fransisco placed a book on the table entitled, "Trim Corporation of America & Concept Fixtures Ltd. Employee Handbook." Di Fransisco stated that the handbook was now their "contract," and according to it they were going to get 2 less sick days and some of them would have their vacation reduced from 4 weeks to 3. He told the men to read the book and "tell us the

[2] These employees were laid off prior to union negotiations and left.

decision you're going to take." Di Fransisco left the handbook for the employees to read and told them it was now "their contract." At no time during contract negotiations did Respondent submit this handbook as a contract proposal.

After Di Fransisco left the room, Cruz picked up the handbook and showed it to Union Representative Anderson after leaving work.

Yulson and Amos the two other employees at this meeting incredibly testified that Di Fransisco called them, along with Cruz. In this regard Yulson testified:

> Richie Di [Di Fransisco] called us in [to his office] and says' under order of management, I'm not going to get involved in negotiations for this contract year. And then he walked out. . .

Pursuant a leading question, Respondent's attorney asked:

> Q. Now, you heard testimony earlier today about a meeting in a locker room with Mr. Di Fransisco, Mr. Cruz, Mr. Yulson and yourself and that Mr. Di Fransisco spoke about whether you should remain in the Union at that meeting, what's your recollection of that?
>
> A. I was in a meeting with Richard Di Fransisco, Bob Yulson and Wilfredo Cruz.
>
> Q. In 2004, has Mr. Di Fransisco—what, if anything, has Mr. Di Fransisco said to you about whether or not you should be in the Union?
>
> A. Nothing.

I find it incredible that a supervisor would call these employees into his office simply to state that he was not getting involved in the union negotiations. I find Yulson and Amos untruthful witnesses. Moreover, Di Fransisco did not testify. Although he was still working as a supervisor for Respondent, Respondent's attorney did not provide any reason for his absence. As set forth below, I find an adverse inference should be drawn. Respondent contends that Cruz obtained the handbook through "dishonest means," however, Respondent offered no evidence for this contention.

Moreover, if the handbook was not presented at the meeting, how would Cruz know about it?

I find Cruz to be a credible witness generally, but especially during the June 23 meeting Cruz' testimony was detailed, not the kind that could easily be manufactured. His testimony as to the June 23 meeting and the handbook distribution has the ring of truth. Moreover, his testimony, direct and cross was consistent, detailed, and responsive.

Further, Cruz was employed at the time of this trial, another factor which bears favorably as to his credibility.

As set forth above, I find and adverse inference should be drawn, Di Fransisco did not testify during this trial although he was still employed as supervisor at this time.

The Board has made it clear that in Board trials the proper inquiry in determining whether an adverse inference may be drawn from a party's failure to call a potential witness is whether the witness may reasonably be assumed to be favorably disposed to that party. *Electrical Workers Local (Teknion, Inc.),* 329 NLRB 337 (1999). The Board has found that an adverse inference can be drawn from the Respondent's failure to call a current supervisor, *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988); *Earle Industries,* 260 NLRB 1128 (1982); and *Martin Luther King Sr. Nursing Center,* 231 NLRB 15 (1977). An adverse inference may also be drawn regarding any factual question on which the witness is likely to have knowledge and it may be inferred that the witness, if called, would have testified adversely to the party on that issue. See also *Electrical Workers Local 3,* supra; and *International Automated Machines,* supra.

Further, after the startling events of the June 23 meeting Cruz started a journal and entered facts consistent with this meeting. When questioned as to why he started such a journal at this particular time, he credibly testified "That's the same day I had to decide what I was going to do. Whether we were going to work for the company and not have a union."

I find Cruz to be an entirely credible witness. Not only does his testimony make sense, but his demeanor and the details of his testimony have that ring of truth.

Between June 23 and 28 the employees, including Cruz, had time to think about remaining in the Union. Di Fransisco's statement to the unit employees had to have a negative effect on their continued membership in the Union. Especially when he produced the new employee handbook, told the employees that the handbook was their contract which had significant reductions from the recently expired union contract.

On June 28, Di Fransisco summoned Yulson and Amos to his office where they met with Di Fransisco and Pawigon admittedly helped them write their union resignation. This meeting took about 45 minutes.

Given the credible facts of June 23, it seems incredible that both Amos and Yulson would decide to resign from the Union on the same day.

In this regard, when Amos was questioned when he decided to resign from the Union, he gave three inconsistent answers. He could not answer with any certainty this crucial question: "When did he decide he wanted to resign from the Union?" On cross-examination, when asked the question if he woke up that morning knowing he was going to resign, he replied, "No." He stated further that he *had not* made up his mind to resign prior to asking to meet with Pawigon that day. However, later when questioned by the judge, Amos testified that the reason that he asked to meet with Pawigon was, "to let him know that I had made up my mind, I was going to resign from the Union." And then, a few minutes later during more cross-examination Amos declared: "I already had made up my mind that I was going to resign before I came to work that day." I find these shifting responses on such a crucial question totally undercut his credibility.

Yulson was equally unimpressive as a witness. He expects us to believe that his reason for resigning from the Union on June 28 was because of an incident that occurred 10 years earlier. If he was so dissatisfied with the Union then why did he wait 10 years to do anything about it? Yulson offered no reasonable explanation for this lack of logic. Yulson was evasive and vague when he testified about telling with Amos he was dissatisfied with the Union and might resign. He claims they spoke about both issues.

That same day, June 28, in the morning and when Yulson and Amos came out Cruz asked each of them what they talked about and they each said that it was "just about work." Later that same day, Cruz was called into Pawigon's office. Pawigon showed him the letter Respondent's attorney had written to the Union informing it that a majority of the employees no longer supported the Union; it was withdrawing recognition and canceling the parties' next scheduled negotiation session. That afternoon the Union received the faxed letter.

It seems highly unlikely that Amos and Yulson would have resigned from the Union in view of Respondent's handbook which took away terms and conditions of the recently expired union collective-bargaining agreement.

Moreover, these give backs were set forth in Respondent handbook wherein Di Fransisco showed them the handbook and told them "this was their contract."

After Respondent withdrew recognition several changes were instituted in the terms and conditions of employment for the unit employees. Sick days were reduced almost immediately. Employees were not given a half day for Election Day. Cruz did not get his personal day for his birthday on November 25. In July, Respondent implemented a new health insurance plan. Respondent also reduced the vacation days of some employees and it reduced the number of bereavement days for all.

On December 20, Respondent laid off Cruz, although he had top seniority[3] Yulson and Amos remained employed even though Cruz' position as shop steward gave him "superior seniority" over the two of them. Respondent gave no prior notice of the layoff to the Union. On April 4, 2005, approximately 6 weeks after the Region issued the second consolidated amended complaint, Respondent reinstated Cruz to his former position.

C. The 8(a)(1) Violations

I find the credible testimony of Cruz establishes that Di Fransisco threatened Cruz, Yulson, and Amos on June 23 with discharge if they did not abandon the Union, by telling them if they wanted to keep their jobs they would have to "fight for themselves." I find this is a clear threat to resign from the Union or lose their jobs. The Board has held that and employer may not threaten employees with discharge if they continue to support their union. See *Nicholas County Heath Care Center,* 331 NLRB 970 (2000); and *87-10 51st Avenue Owners Corp.,* 320 NLRB 993 (1996).

Although this allegation is not specifically alleged as a threat, I find it to be a violation of Section 8(a)(1), *Redd-I, Inc.*, 290 NLRB 1115, 1115–1118 (1988).[4]

D. The 8(a)(5) Refusal to Provide Information

The record evidence establishes that when Respondent failed to provide the information requested by the Union in its April 27 and May 3 letters it violated the Act. When making an information request for items not presumptively relevant, the Union is obligated to state why the information is relevant. See, *Associated Ready Mixed Concrete,* 318 NLRB 318 (1995), enfd. 108 F.3d 1182 (9th Cir. 1997); *Quality Building Contractors, Inc.,* 342 NLRB No. 38, (2004). Where information requested relates to matters outside the unit that might have a bearing on the employment terms and conditions of the unit employees, the burden is on the Union to prove relevancy in order to establish a violation on the basis of the employer's failure to furnish the requested information. Id. and cases there cited. The Board applies a "liberal, discovery-type standard" in determining relevancy. Id., citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

In the instant case, despite Respondent's specious responses questioning the relevancy of the requests, the facts demonstrate that the Union informed Respondent of their relevancy from the time of its first request. At the first negotiation session prior to the first request Respondent told Anderson that Heritage was owned by the same individuals who owned Respondent and Anderson told them that he was aware that Heritage employees worked alongside unit employees doing bargaining unit work. I find those factors along with the specific language in the parties' collective-bargaining agreement extending coverage to any entity found to be an "alter ego" of Respondent establishes the Union's right to its detailed information requests which would enable it to determine if Heritage was such an entity. All the information in the April 27 and May 3 letters would assist the Union in determining if Respondent was violating the parties' collective-bargaining agreement, specifically information concerning its operations, corporate status and the identity of its employees. The fact that Respondent continued to question the relevance does not mean that the Union had not fulfilled its obligation as required in *Associated Ready Mixed*, supra, it just shows that Respondent would not acknowledge it. And, if the relevance was not clear to Respondent after the receipt of the first letter, the Union's second request resolved any reasonable questions in that regard. Jackson made it clear that the Union suspected an alter ego relationship was in existence. Thus, it is apparent that Respondent knew of the information's relevance to the Union, chose to claim otherwise and refused to provide it in violation of the Act.

E. The 8(a)(5) Unlawful Withdraw of Recognition

The crucial issue to resolve in the instant case is *whether or not Respondent lawfully withdrew recognition on June 28.* If it did so, then Respondent's refusal to provide information to the Union would be moot since the Union would no longer represent the unit employees. Similarly, there would be collective-bargaining agreement to enforce and Respondent would have no obligation to continue any of the provisions of the parties' last collective-bargaining agreement, therefore, Cruz would lose his "super seniority" status provided by the contract, and Respondent could lawfully unilaterally alter the employees' terms and conditions of work.

However, the incredible evidence does not support Respondent's contention in this regard.

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board overruled *Celanese Corp.*, 95 NL:RB 664

[3] Sec. 1(A) and (B) of the expired contract provides: "(a) The Employer agrees to give 5 calendar days in advance of layoff. (b) Stewards and Local officers shall be entitled top seniority for purposes of layoff."

[4] Once again I find Di Fransisco's absence from this trial, although presently working for Respondent, without an explanation as to why he did not testify requires an adverse inference.

(1951), and it progeny insofar as they permitted an employer to withdraw recognition from an incumbent union on the basis of a good-faith doubt of the union's continued majority status. In *Levitz*, the Board held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." Id. at 717. The Board held that an employer must show an actual loss of support by a majority of bargaining unit members to withdraw recognition from an incumbent union. It cannot withdraw recognition and refuse to bargain with an incumbent union merely on the basis of a good-faith doubt regarding the union's majority support.

In the instant case, there is no dispute that Respondent has established that the Union lost the support of a majority of unit members on June 28. However, there remains the issue of whether Di Fransisco's statements to Cruz and the entire bargaining unit on June 23 were unlawful, thereby, tainting the subsequent resignations of Amos and Yulson. If so, Respondent would have violated Section 8(a)(5) and (1) in relying on these resignations when it ceased bargaining with the Union, since they were tainted by Respondent's prior unremedied unfair labor practice in accordance with *Vincent Industrial Plastics*, 328 NLRB (1999); see *Bunting Bearings Corp.*, 343 NLRB No. 64 (2004).

In *Vincent Industrial*, supra, the Board found that in order to demonstrate that an employee withdrawal petition is "tainted," the General Counsel must establish that there is a causal relationship between unremedied unfair labor practices and the employees' expression of disaffection with the incumbent union. When the unremedied violations of the Act do not include a general refusal to bargain, the Board considers several factors to determine whether such a causal relationship has been established:

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. Id.

In the instant case the credible testimony of Cruz establishes that Di Fransisco told them "the Union was not as strong as it used to be" and if they wanted to continue to work for Respondent they would have to fight for themselves. Then Di Fransisco placed a new handbook before the employees, never used before, and told them this handbook was now their "contract."

Such statement clearly implies that they were no longer represented by the Union and the employees handbook was now their "labor contract." Less then 2 weeks later Amos and Yulson coercively resigned. Clearly the criteria meets the criteria of *Vincent Industrial*, supra; the timing of the June 23 threat and the June 28 withdrawals from union membership.

Also, Respondent's refusal to supply relevant information further establishes Respondent's bad-faith bargaining. In this regard, Yulson, whose credibility is questionable, did admit that he was dissatisfied with the Union in part because of the focus at the bargaining table on Heritage, the alleged alter ego. Perhaps if Respondent had complied with the requests at the time the Union issued them, negotiations would not have been bogged down by this issue and might have been wrapped up by June 28. Thus, I find the facts support the unavoidable conclusion that the subsequent withdrawal of support of the Union was caused by Respondent's previous unremedied unfair labor practices.

F. The 8(a)(5) Unilateral changes in Terms and Conditions of Employment

The law regarding the lawfulness of an employer's unilateral change is as follows: Under *Civil Service Employees Assn., Inc.*, 311 NLRB 6 (1993), in order for the employer's action to be determined unlawful there must be "a material, substantial and significant change," quoting *Murphy Diesel Co.*,184 NLRB 757 (1970). In the instant matter it is undisputed that Respondent made various material and substantial changes in the terms and conditions of employment for unit employees after it withdrew recognition. Moreover, it is clear that Respondent instituted those changes without notifying or involving the Union in anyway. Since I find that the withdrawal of recognition was unlawful, it follows that Respondent subsequent unilateral actions were also unlawful and Respondent should implement the status quo ante until the Union is given the opportunity to bargain to good-faith impasse over those matters in accordance with *Civil Service Employees*, supra.

G. The 8(a)(5) Unilaterally and Without Notice to the Union Laying Off Shop Steward Wilfredo Cruz

The Board has held that a provision in a collective-bargaining agreement that gives "top seniority" or "super seniority" to shop stewards survive the agreement expiration. See *Frankline, Inc.*, 287 NLRB 263 (1987). Thus, the failure to give the shop steward "super seniority" as to layoff violates the collective-bargaining agreement and the Act. The Board in *Bethlehem Steel, Co.*, 136 NLRB 1500, 1502 (1962), found that the prohibition against unilateral changes after a contract has expired specifically held that the abolition of "super seniority" provisions violates the Act.

In light of the above it is clear Respondent violated the Act in this regard. In the instant case there is no dispute that the parties' contract contained a "super-seniority" clause. That clause clearly gave Cruz "top seniority" in the shop. It is also uncontested that on December 20 when it laid off Cruz, Amos, and Yulson remained employed and Respondent gave the Union no prior notice of the lay off, and the Union, therefore, had no opportunity to bargaining over this change beforehand.

CONCLUSIONS OF LAW

1. Respondent is engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is at all times material the collective-bargaining representative of a unit of warehouse and assembly employees employed at its Brooklyn, New York facility excluding clerical employees, supervisors and guards as defined in the Act.

4. Respondent has committed various violations as set forth above in violation of Section 8(a)(1) and (5) of the Act.

5. Having laid off Wilfredo Cruz, the union shop steward without notice to the Union and failing to give the Union an opportunity to bargain about such layoff, I find such conduct in violation of Section 8(a)(1) and (5).

I Order that Respondent cease and desist there from, and take certain affirmative action designed to effectuate the policies of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices described above, I shall recommend an Order requiring Respondent to cease and desist certain activities and to take certain action described below.

1. With respect to shop steward Wilfredo Cruz, I shall recommend that he be made whole from the date of his layoff until his recall and this includes other benefits as defined by the Board is made by Respondent. Back pay is computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed by *New Horizon for the Retarded*, 283 NLRB 1173 (1987).

2. Having found that unilateral changes in sick leave, etc., and other terms and conditions of employment were made, I shall recommend such employees who suffered from such unilateral change must be made whole as set forth above.

3. Having found Respondent violated Section 8(a)(1) and (5) of the Act, I shall recommend Respondent supply all information requested, as set forth above.

Upon these findings and conclusions of law I shall issue the following recommended[5]

ORDER

The Respondent, Trim Corporation of America, Brooklyn, New York, its officers, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to furnish to the Union, Local 2179, International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO, the information requested by the Union, alleged in this complaint.

(b) Withdrawing recognition from the Union, described above, unless and until an appropriate Board election.

(c) Making unilateral changes in the expired collective-bargaining agreement without giving notice to the Union and give the Union any portions of that collective-bargaining agreement included, but not limited to (1) Reduce the number of sick days; (2) Reduce the number of bereavement days; (3) Reduce the number of vacation days; (4) Changing the medical insurance coverage without prior notice to the Union and without giving the Union an opportunity to bargain about such change.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order make whole Wilfredo Cruz as set forth fully above in the remedy section of this Order.

(b) Within 14 days of this Order, Respondent will make whole, as set forth above, any employees for any unilateral changes relating to wages, hours, and other condition of employment.

(c) Within 14 days from this Order, Respondent must supply to the Union all information concerning negotiations relating to the recently expired collective bargaining.

(d) Within 14 days of this Order, Respondent shall make whole, with interest as set forth in the remedy provision of this decision, all benefits unit employees should have received as set forth above from June 28, 2004.

(e) Within 14 days after service by the Region, post at its 882 Third Avenue, Brooklyn, New York facility, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since.

Dated, Washington, D.C. September 7, 2005

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to furnish to the Union, Local 2179, International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO, the information requested by the Union, alleged in this complaint.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT withdraw recognition from the Union, described above, unless and until an appropriate Board election.

WE WILL NOT make unilateral changes in the expired collective-bargaining without giving notice to the Union and give the Union any portions of that collective-bargaining agreement included, but not limited to (1) reduced the number of sick days; (2) reduce the number of bereavement days; (3) reduce the number of vacation days; and (4) changing the medical insurance coverage with prior notice to the Union and without giving the Union an opportunity to bargain about such change.

WE WILL make whole Wilfredo Cruz as set forth fully above in the remedy section of this Order.

WE WILL make whole employees who suffered a monetary loss as a result of our unilateral changes.

TRIM CORPORATION OF AMERICA, INC.